



April 9, 2003

*Via e-mail to cool@usda.gov
Original to Follow Via Overnight Delivery*

The Honorable Ann Veneman
Secretary, U.S. Department of Agriculture
Country of Origin Labeling Program
Agricultural Marketing Service
Stop 0249, Room 2092-S
1400 Independence Avenue SW
Washington, DC 20250-0249

**Re: *Comments on Guidelines for Voluntary Country of Origin Labeling
Program***

Dear Secretary Veneman:

Albertson's, Inc. ("**Albertsons**") appreciates this opportunity to comment on the guidelines prepared by United States Department of Agriculture ("**USDA**") entitled "Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities and Peanuts ("**Voluntary COL Guidelines**") (67 Fed. Reg. 63367).

COMPANY PROFILE:

Albertsons is one of the world's largest food and drug retailers, with annual revenues of approximately \$38 billion. Based in Boise, Idaho, Albertsons employs more than 200,000 employees and operates approximately 2,300 retail stores in 31 states across the United States, under banners including Albertsons, Jewel-Osco, Acme, Albertsons-Osco, Albertsons-Sav-on, Sav-on Drugs, Osco Drug, Max Foods and Super Saver.

Each year, Albertsons moves approximately 2.6 billion pounds of fruits and vegetables, 325 million pounds of beef, 100 million pounds of pork, and 98 million pounds of fish and shellfish through 13 distribution centers before reaching our stores and, ultimately, our customers. We purchase fresh produce from over 1,850 suppliers, who sell agricultural products originating in over 30 different countries worldwide. While Albertsons is dedicated to selling US-grown beef in our stores, our 12 ground beef suppliers purchase beef products from the United States, Canada, Argentina, Brazil, New Zealand, Brazil and a handful of other countries. We purchase fish and shellfish caught or harvested in more than 25 countries from more than 50 different suppliers. Based on

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the foregoing numbers, it is clear that the Voluntary COL Guidelines and the final regulations will have a staggering impact on the way we do business.

PRELIMINARY MATTERS:

Although Albertsons has a long history of supporting voluntary country of origin labeling programs, we are duly concerned about the potential costs of compliance with a mandatory program and how those costs may ultimately impact our customers. As explained more fully below, a retailer must develop an intricate system of product segregation and labeling to comply with COL. Albertsons purchases covered commodities from more than 1,900 suppliers who sell products grown in more than 30 different countries worldwide. Since the proposed guidelines require us, as retailers, to keep a verifiable audit trail and adequately segregate the covered commodities in our distribution centers and in the back room of each store as well as on display, we must implement a detailed record keeping and compliance system. This will take hundreds of man-hours to develop and execute, and many more hours company-wide on an ongoing basis to ensure compliance.

We offer the following cost estimate for your consideration. This cost estimate is based in part upon our experience with the costs incurred to comply with the State of Florida's less stringent country of origin labeling program for produce. All totaled, we estimate the time required to develop and implement the necessary COL record keeping, record processing and segregation plans (including, without limitation, system development at our corporate offices; implementation and training for all employees at 13 distribution centers, 11 division offices, 2,299 retail stores, and our on-line shopping subsidiary, albertsons.com; and ongoing costs associated with country of origin signage, labeling and record keeping) equals 604,882 hours, valued at approximately \$13 million, and additional capital expenses of \$3.5 million (including, without limitation, changes to our retail store prototype, segregation bins and other structural devices to segregate the covered commodities). This is a very conservative estimate.

Given the exorbitant costs of compliance, Albertsons strongly encourages the USDA to implement simple regulations that support the letter and intent of the statute, and do not pass along additional verification or enforcement responsibilities to retailers. In particular, as you develop regulations, we urge you to address the matters indicated below.

COMMENTS ON VOLUNTARY GUIDELINES:

1. Suppliers Must Be Held Accountable for Providing Retailers with Accurate and Verifiable Country of Origin Information.

The law requires retailers to provide consumers with information that retailers can only obtain from their suppliers. (Section 282). Given this fact, the law also holds suppliers accountable for providing information to retailers. (*See* Section 282(e)).

A. Suppliers Are in the Best Position to Supply the COL Information to the USDA.

USDA's Voluntary COL Guidelines properly recognize that the entire food chain must bear responsibility for a country of origin labeling program if consumers are to receive accurate country of origin information. In furtherance of this principle, the Voluntary COL Guidelines state that producers, growers, handlers, packers, processors and importers must maintain auditable records documenting the origin of covered commodities and that these persons must make country of origin information available to retailers. In drafting the final regulations, the USDA must also recognize the obligations that these parties share and must further hold them accountable through stringent enforcement measures to ensure that retailers have accurate information to provide to consumers.

Instead of further burdening the retailers with verifying country of origin information and carrying out the Agency's obligations of enforcement, the supplier should bear the ultimate burden of maintaining the verifiable audit trail mandated by the regulations. Moreover, suppliers must be responsible for keeping accurate records since suppliers are the link in the supply chain that is in the best position to determine the country of origin of the products they are distributing to retailers. This shift in record keeping requirements minimizes duplication and comports with Congress' intent in establishing the record keeping process and charging the suppliers with the ultimate burden to verify the accuracy of country of origin information. (*See* Section 282(e)).

To prove that suppliers bear the ultimate responsibility for supplying country of origin information, we offer the following examples to illustrate why retailers lack the necessary information to make such a determination. Albertsons offers its customers a number of tomato varieties in every store including Hot House, Roma, cherry, grape, hydroponic, tomatoes on the vine, and other varieties. We purchase tomatoes from over two hundred (200) suppliers in three (3) different countries. Indeed, we have over forty

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(40) different stock keeping units (“SKUs”) for tomatoes in any given store. Currently, it is rather easy for our employees to segregate the different varieties of tomatoes because different varieties have distinct color and size characteristics. However, it is nearly impossible to determine a tomato's country of origin by simply looking at the tomato. A Roma tomato from California looks considerably similar to a Roma tomato from Mexico. Without country of origin information provided by the supplier, a retailer does not know what information to pass along to the consumers. Even given such country of origin information, a retailer lacks the tools to determine the accuracy of such information provided by suppliers because the products look the same regardless of where they were grown or produced.

Similarly, Albertsons stocks Granny Smith, Braeburn, Gala, Fuji, Golden Delicious, Red Delicious and many other apple varieties in our retail stores. Indeed, there are over one hundred (100) SKUs for apples. While a store clerk can easily distinguish a Golden Delicious from a Granny Smith, the store clerk must rely on the sticker or the information on the box to determine whether the apple was grown in the United States or New Zealand. Since we purchase apples from five (5) different countries, our employees cannot be held accountable for conveying country of origin information unless such information accompanies the product when it reaches our distribution centers and, ultimately, our retail stores.

Bananas, the best selling items in our retail stores, are yet another example. Each year, Albertsons customers purchase 320 million pounds of bananas, which equates to an entire ship full of bananas heading to an Albertsons distribution center every two (2) weeks. Based upon seasonality, we purchase bananas from Mexico, Guatemala, Costa Rica and Honduras. However, Mexican bananas do not look any different than Guatemalan bananas or Costa Rican bananas. A stock clerk in our produce department cannot bear the responsibility of determining from which country a hand of bananas originated. Instead, the suppliers must ensure that each hand of bananas (if not every banana) is properly stickered or otherwise marked with the correct country of origin. Just as Congress intended, the supplier must bear the burden of supplying the correct country of origin information to the retailer.

These examples illustrate just how difficult it is for retailers to determine the country of origin for any given covered commodity, and the additional problems associated with requiring retailers to confirm the accuracy of information passed on by suppliers. These examples discuss but three (3) varieties of fruits – yet Albertsons carries hundreds of covered commodities in every store. When you consider the number of covered commodities and the number of different countries from which those commodities may be purchased, verifying country of origin accuracy on any given

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covered commodity becomes nearly impossible for retailers. The information retailers convey to the consumers is only as good as the information provided by the suppliers. Therefore, the regulations should underscore the importance (and indeed the necessity) for suppliers to verify country of origin and provide accurate information to retailers.

Since country of origin is a factual determination made long before a covered commodity reaches our distribution centers and the country of origin will not change despite shipping or processing, all covered commodities must be labeled before reaching a retailer's distribution chain. To ensure that Roma tomatoes from the United States are not displayed with Roma tomatoes from Mexico, retailers must keep such products separate and apart at the distribution center and in the storeroom of each retail store. To separate Gala apples grown in the United States from those Gala apples grown in New Zealand, the producer and supplier must ensure that each apple is individually stickered with the correct country of origin information. However, retailers can only meet their obligation to provide country of origin information to the consumer if retailers are given accurate, verifiable information from suppliers. Therefore, USDA should look to suppliers (not retailers) to determine the accuracy country of origin information for audit purposes.

B. Requiring Suppliers to Maintain Records Minimizes Duplication and Relieves Retailers from the Unnecessary Burden of Verifying Country of Origin Information.

Retailers are the part of the food distribution chain with the largest product mix and the quickest turnover. Yet, retailers currently bear the largest record keeping burden under the Voluntary COL Guidelines. Instead of requiring retailers to maintain country of origin records for two (2) years in our retail stores, the regulations should require suppliers to maintain such records for two (2) years and require retailers to maintain information from which supplier a covered commodity was purchased. Since the retailer makes no determination about country of origin, the retailer is not the proper entity to be audited in this case. Rather, if USDA chooses to audit country of origin information displayed by a retailer, USDA should contact the retailer who, in turn, would put the USDA in touch with the supplier from whom the covered commodity was purchased. The USDA would then audit the records of the supplier, not the retailer. Additionally, requiring the retailer to maintain country of origin records on each covered commodity is duplicative since suppliers must maintain that information by law. By separating the record keeping process into two separate components, duplication of work is minimized and both the suppliers and retailers have definable duties under the regulations.

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As a retailer, Albertsons is certainly willing to comply with any USDA audit by producing records that indicate from which suppliers products were purchased. We are also committed to notifying all of our suppliers that the regulations are in existence and, in the future, our policy will be to purchase product only from suppliers who certify to us that they have developed an accurate, verifiable record keeping system that meets the letter and intent of the statute. However, maintaining our own audit trail of country of origin information is duplicative, time-consuming and unnecessary. Since the suppliers are charged with the responsibility of verifying such information and, to carry out their obligations under the statutes, suppliers must maintain these records, the USDA should look to the suppliers to ensure that accurate information is being provided to the retailers and, ultimately, the consumer.

2. Retain Flexible Methods of Country of Origin Notification.

The statute allows country of origin information to be provided by means of a "label, stamp, mark, placard or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers." The Guidelines generally follow the statute and further provide that the information must be "conspicuous," and either typed, printed or handwritten.

We urge the Secretary to maintain flexibility in the methods of notification. Furthermore, USDA should expressly recognize that country of origin information can be considered "conspicuous" even if it is a label placed on the back of a random weight package. The country of origin declaration for hamburger, as explained in the Voluntary COL Guidelines, could cover a substantial amount of the product if it was required to appear on the front of the package with all of the other federally mandated labeling. (Some counties limit the amount of package surface that may be covered to avoid concealing products from consumers.) Accordingly, if the information is presented to consumers so that they can readily find it, the information should be considered conspicuous and our obligation met. Indeed, labels on packages should be encouraged since they are available to consumers for a greater period of time than signs posted at the point of sale.

3. Do Not Require Retailers To Keep Country of Origin Records for Two Years in Every Retail Store.

The final regulations should reduce a retailer's record keeping obligation by requiring maintenance of only those records reasonably necessary to meet the statutory requirements. As explained above, retailers have no control over the country of origin determination, which must be made well before the food product reaches the retail

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grocer's control. Accordingly, retailers should only be required to maintain that information necessary to direct the USDA to the individual or entity who made the country of origin determination, namely the supplier.

As currently written, the Voluntary COL Guidelines require every person engaged in the business of supplying a covered commodity for retail sale to keep records on the country of origin of the covered commodity for two (2) years. Basic records must be kept at store level; contracts and other more detailed records may be kept at warehouses or corporate headquarters. These suggested requirements are onerous and duplicative and should not be included in the final regulations.

Rather, the USDA should promulgate regulations that continue to allow records to be kept in hard format or electronic version. Giving retailers some options for the way they maintain records promotes flexibility and reduces the costs associated with record keeping. However, requiring records to be maintained at store level for two (2) years is burdensome and unnecessary. Since most covered commodities will be sold within a week of arriving in our stores, retailers should not be required to keep two (2) years' worth of records for covered commodities at store level. Retaining records for this period of time at the retail level will serve no useful purpose and cause substantial cost. To further the purposes of the statute, it makes more sense to allow retailers to maintain the records electronically and, if necessary, look up a particular bill of lading or purchase order to determine from which supplier the covered commodity was purchased and from which country the covered commodity originated. While providing the same information, allowing retailers to maintain such records electronically (instead of requiring that paper records be maintained at the store level for two (2) years) substantially reduces the cost associated with filing, maintaining and preserving these records for the recommended period.

4. Exempt Food Service Areas of Grocery Stores.

In addition to the customary grocery sections, such as produce, meat and general grocery, Albertsons offers consumers prepared foods at delis, salad bars, sushi bars, through catering, and other departments.

The statute exempts food service establishments from the country of origin labeling program. (*See* Section 282(b)). The Voluntary COL Guidelines define the term "food service establishment" to include salad bars, delis and other prepared food enterprises that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises. We urge USDA to continue to recognize that any prepared foods provided from these departments within the retail store are properly considered subject to

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the statute's exemption from country of origin labeling for food service establishments. For example, trays of cut vegetables from our catering operations, fruit salad sold at delis or throughout the store, and foods provided at our salad bars and sushi bars are all prepared at food service and should not require country of origin stickering or labeling.

5. Recognize Customer Receipt as "Final Point of Sale" for Internet Transactions.

The statute requires retailers to provide consumers with country of origin information on covered commodities at the final point of retail sale. In the Voluntary COL Guidelines, USDA interprets this to require the retailer to provide country of origin information on the sale vehicle, such as the Internet site. The basis for this is the "Agency's belief that consumers must be made aware of the country of origin of the covered commodity before the purchase is made."

This approach is not required by law and would literally require us to overhaul our entire electronic food delivery system. Specifically, we fulfill consumers Internet orders by having "shoppers" at our individual retail grocery stores select the items that were ordered electronically by the consumer.

By its very nature, electronic sales require the consumer to relinquish a certain amount of control for the convenience and time-saving approach of using shoppers to pick their merchandise. Certainly, an e-consumer would not expect to squeeze and smell a cantaloupe before purchasing the fruit. Rather, the e-consumer would defer to the shopper to pick the freshest fruit available, and Albertsons prides itself on filling our e-customers' shopping bags with the freshest commodities in our stores at the time their orders are filled. Although we strive to accommodate all special requests made by our customers – selecting firm apples, pale yellow bananas and the leanest ground beef – our e-customers understand that they are relinquishing a certain amount of control for the convenience of having their groceries delivered to their homes. We shop for them – they save precious time to spend with their families, finish a last minute project at work or pursue a hobby in their spare time.

While Albertsons will make every effort to accommodate the country of origin requests of our e-consumers, the nature of the retail supermarket business may not allow us to do so in every instance. Different stores will have covered commodities with different country of origin declarations. For example, we may have strawberries from four (4) different countries at our regional distribution center that will be distributed to several hundred different stores. The scenario could be repeated for bananas, grapes, tomatoes and most of the other perishable produce that we offer to consumers, not to

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mention the meat and seafood products. Even if we informed consumers of all possible options for each covered commodity – a situation that changes on a daily basis – and allowed the consumer to choose covered commodities with a particular country of origin, the choices on our webpage would not necessarily reflect what was actually available at the individual stores at the time the e-consumer's order was shopped.

Accordingly, for purposes of remote sales, retailers should be allowed to satisfy their obligation to inform consumers of the country of origin of covered commodities by providing information to the consumer at the time the food is delivered to the consumer.

6. Enforcement.

Retailers are subject to penalties only for “willful” violation of the statute. (Section 283). USDA's regulations should recognize this standard in several important respects.

A. Congress Intended Leniency for Retailers.

The construction of the statute's enforcement section emphasizes the conclusion that Congress intended to impart some leniency on retailers and not overburden them with cumbersome requirements. Pursuant to Section 283, retailers are subject to different (and arguably less stringent) enforcement standards than others in the food distribution chain. Specifically, Section 283 explicitly incorporates the enforcement provisions of the Livestock Mandatory Reporting Subchapter (codified at 7 U.S.C. § 1636b), which grants the Secretary enforcement authority over *any person* who violates the statutory provisions. Upon a statutory violation, *any person* may be subject to a \$10,000 violation of the statute. There is no notice requirement or opportunity to cure a suspected violation. In other words, *any person* violating the country of origin statute is in *per se* violation of the statute and subject to a healthy fine for every violation, including ongoing violations.

However, subparagraphs (b) and (c) of Section 283 set forth separate and more relaxed enforcement standards for *retailers*. Pursuant to Section 283(b), USDA must notify a *retailer* of the Secretary's determination that a *retailer* is in violation and provide the *retailer* thirty (30) days in which to remedy the violation. Clearly, such leniency is afforded only to retailers. By contrast, USDA is not required to provide such warning or remediation periods for non-retailers or other members of the food distribution chain.

Further, the USDA must determine that a retailer *willfully* violated Section 283(c) before subjecting such retailer to a fine under the law. All other persons are subject to a

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fine of up to \$10,000 per violation under 7 USC § 1636b, as incorporated by Section 283(a), regardless of intent. However, a retailer must knowingly mislabel a covered commodity, willfully mislead consumers about the origin of a covered commodity, deliberately disregard requirements of the statute or perform an act with specific intent to violate the statute. This *mens rea* element, and a high *mens rea* element at that, indicates that Congress intended to protect retailers from possibly harsh, burdensome requirements of the statute. The regulations should reflect Congress' intent that *retailers* enjoy certain leniency under the statute.

B. Stickers on Majority of Items Is Sufficient To Inform Consumers.

USDA should recognize that if the majority of individual covered commodity items bear a label indicating the product's country of origin, the retailer has met the statute's requirement to inform the consumer of the country of origin of that covered commodity. In a perfect world, suppliers would sticker every individual item with country of origin information. However, not all covered commodities will be stickered because of adhesive efficacy and consumer shopping habits. For example, suppliers currently apply one or two stickers to a hand of bananas that may be comprised of six or seven individual bananas. Consumers frequently separate individual bananas from the bunch in which they were shipped so that not all individual bananas will be labeled throughout the display, even if the supplier labeled each hand before shipment. However, the supplier's labeling of a majority of bananas, and the retailer's subsequent display of a partially-stickered hand of bananas, should not rise to the level of a willful violation of the statute.

Similarly, although the technology for label adhesives has improved, no label adhesive is effective 100% of the time. Although apples have a smooth skin and stickers generally adhere to them, stickers do not adhere well to oranges and kiwis and many other fruits. Therefore, USDA should recognize that, if the majority of covered commodity items on display bear country of origin labels, the retailer has met its obligation to inform the consumer of the country of origin of the covered commodity and has not willfully violated the statute, even if some covered commodities in the display do not bear a label.

C. Reliance on Information Provided by a Supplier Is Evidence That Retailer Has Not Willfully Violated Statute.

USDA should expressly recognize in the regulations and the preamble some circumstances under which retailers will not be considered to have violated the statute willfully. For example, USDA should state that the Agency will not conclude that a

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retailer has willfully violated the statute for providing inaccurate country of origin information for a covered commodity if the supplier has certified to the retailer that the supplier has an established system for determining country of origin. In other words, if the retailer reasonably relied on the supplier's representation that it had a verifiable audit tool in place, the retailer's reliance on inaccurate information provided by the supplier is not evidence of a willful violation. Indeed, as discussed above, the very nature of the country of origin statute requires the retailer to rely on information provided by suppliers.

Additionally, USDA should retain the voluntary user-fee-based audit system in the final regulations.

7. Issue Regulations Quickly.

Finally, we urge you to conduct the rulemaking promptly and efficiently. Section 285 of the statute states that the provision "shall apply to the retail sale of a covered commodity beginning September 30, 2004." Since we are required to set up significant systems to obtain the necessary information from our suppliers, to provide the information to consumers, and then to retain the information, we must know what those systems must accommodate as quickly as possible.

SUMMARY:

Albertsons is committed to offering its customers the freshest products on the market while supporting a consumer's "right to know." We strive to purchase products grown and processed in the United States whenever such products are available in acceptable quantity and at an acceptable price. Albertsons stands ready to work with the USDA to develop regulations that strike the proper balance between protecting the American farmers, fishermen and agricultural producers and giving our customers an informed choice when it comes to purchasing such goods in our stores. However, we urge you to issue the regulations quickly so that the entire food distribution chain has the opportunity to respond and implement programs that are compliant-ready by the effective date. In drafting regulations, we encourage the USDA to consider our recommendations and keep the regulations as simple as possible. Indeed, the regulations should follow the letter of the statute and not expand its scope or unfairly overburden retailers with unnecessary paperwork, record keeping or enforcement responsibilities.

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The USDA has an exciting opportunity to consider the recommendations of retailers, suppliers, producers and consumers, and finalize regulations that equally split the burden while giving the consumer the information required under the statute. If we can provide you with any additional information or otherwise be of assistance to you or the USDA as you undertake this important endeavor, please let us know.

We appreciate your attention to our concerns and recommendations, and urge you to develop the regulations using the foregoing recommendations as expeditiously as possible.

Very truly yours,

ALBERTSON'S, INC.



Clement L. Stevens
Group Vice President,
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